restored and the case should proceed to trial. We would therefore allow this appeal with costs both here and in the court below. The deposit should be refunded to the appellants.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.; Manuel & Segran.*

PUBLIC PROSECUTOR v. LENG CHOW TENG

[F.C. (Seah, Mohamed Azmi & Syed Agil Barakbah F. JJ.) September 17 & December 12, 1984]
[Kuala Lumpur – Federal Court Criminal Reference No. 3 of 1979]

Criminal Law and Procedure – Plea of guilty – Plea of guilty in absence of counsel lawful – Plea not to be accepted unless Court is satisfied that absence of counsel properly accounted for – Criminal Procedure Code (F.M.S. Cap. 6), s. 173(a), (b) & (m).

In this case the respondent had been charged in the Magistrate's Court on two charges for possession of opium and possession of utensils for smoking opium. The respondent appeared with counsel on August 17, 1978 and claimed trial to both charges. A date of hearing was fixed for February 15, 1979 and bail was granted. The case was however postponed to August 9, 1979 and the accused was remanded in custody. The case against the respondent was brought forward to July 4, 1979 without the counsel being notified. The respondent pleaded guilty and was sentenced to 8 months' imprisonment on the first charge and 3 months on the second charge, both sentences to run with retrospective effect from February 15, 1979. The record was called for by Harun J. and after hearing counsel for the respondent and the Deputy Public Prosecutor he quashed the conviction and set aside the sentences. The Public Prosecutor thereupon referred the following question to the Federal Court –

"Whether a plea of guilty is good in law when made by the accused in person, but without notice to and in the absence of his counsel after the charge has been read and explained to him and he understood the nature and consequences of his plea".

Held: the plea of guilty in such a case is good in law but such a plea should only be recorded but not accepted unless the court is satisfied that the absence of the defence counsel has been properly accounted for. The acceptance of such a plea in the absence of counsel is bad in law as without counsel's advice the accused could not be said to have understood the nature and consequences of the plea or to have intended to admit without qualification the offences alleged against him.

Cases referred to:

(1) *R.* v. *Tan Thian Chai* [1932] M.L.J. 74.
(2) *R.* v. *Heyes* 34 Cr. App. R. 161.

FEDERAL COURT.

Miss Tee Hong Geok (Deputy Public Prosecutor) for the applicant.

Respondent absent (not served).

Cur. Adv. Vult.

Mohamed Azmi F.J. (delivering the Judgment of the Court): At the instance of the Public Prosecutor, the following question of law of public interest has been referred to us under section 66, Courts of Judicature Act, 1964:–

Whether a plea of guilty is good in law when made by the accused in person, but without notice to and in the absence of his counsel after the charge has been read and explained to him and he understood the nature and consequences of his plea.

The respondent was charged in the Magistrate's Court, Kuala Lumpur on two counts under the Dangerous Drugs Ordinance 1952 for possession of opium and utensils for smoking opium, both offences were alleged to have been committed on July 17, 1978. The respondent appeared in court with counsel on August 17 and claimed trial to both the charges. A date of hearing was fixed for February 15, 1979 and as usual bail was granted. The case was however postponed to August 9, 1979 and when counsel appeared on that date, he was informed that the case against his client had been brought forward and his client (the respondent) had apparently pleaded guilty in person on July 4, 1979 without the counsel being notified, and was sentenced to 8 months' imprisonment on the first charge and 3 months on the second charge, both sentences to run with restrospective effect from February 15, 1979 – the date when the accused was apparently put on remand, notwithstanding the bail granted by the court and executed by the respondent.

The record of the criminal proceeding was called up by Harun J. for the purpose of satisfying himself as to the correctness, legality and propriety of the conviction with a view to exercising his power of revision under Chapter XXXI Criminal Procedure Code, after he had received a letter of complaint from Mr. Kanesalingam, counsel for the respondent. After hearing the submission of Mr. Kanesalingam and the Deputy Public Prosecutor,

the learned Judge quashed the conviction and set aside the sentences, and he also held that no retrial should be ordered. Hence the present reference on the question of law to this court.

In his written judgment, the learned Judge observed that it was clear that the lower court proceeded to hear the case on July 4, 1979 without first informing counsel who represented the accused in court on August 17, 1978 and February 15, 1979. He was of the view that this was wrong and went on to state that if an accused person was represented by counsel, no part of the court proceedings should be held in the absence of counsel or without first giving an opportunity to counsel to be present, and if this procedure was not followed it would deprive an accused person of the right to be defended by a legal practitioner of his choice as guaranteed by Article 5(3) of the Federal Constitution. He therefore held that the plea of guilty in the absence of counsel was bad in law.

In our view any plea must in all cases be made by the accused personally irrespective of whether he is unrepresented or represented by Counsel (see *R.* v. *Tan Thian Chai*).[1] It is not sufficient for counsel to say that the accused wishes to claim trial or to plead guilty. The accused must himself plead (see *R.* v. *Heyes*).[2] The only exception is where the charge is preferred under statute which expressly allows the accused to plead guilty by letter. This requirement for the accused himself to make a plea and not merely through his counsel is implicit in sub-sections (a) and (b) of section 173, Criminal Procedure Code which provide:–

"(a) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried.

(b) If the accused pleads guilty to a charge whether as originally framed or as amended the plea shall be recorded and he may be convicted thereon: provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him."

The recording of a plea of guilty as distinguished from the acceptance of such plea by the court is also recognized in section 173(m)(2), Criminal Procedure Code, the relevant part of which provides: "... if a plea of guilty has been recorded and accepted the Court shall pass sentence according to law". Thus, a plea made by the accused in person is not only good in law but also required by law except where a plea of guilty by letter is expressly provided for in any written law. But before a plea of guilty is recorded and accepted it is mandatory under sub-section 173(b) for the court to ascertain that the accused understands the nature and consequences of his plea and that he intends to admit without qualification the offence alleged against him. The words "may be convicted thereon" in sub-section 173(b) and the words "shall ascertain" in the proviso clearly envisage two different meanings and requirements. The sub-section provides that even if the accused pleads guilty the court has a discretion not to convict him with a view to admonish him or to put him on a bond of good behaviour under section 173A(ii), CPC but as in all cases of discretionary powers it must be exercised judicially. The requirement in the proviso before a plea of guilty is recorded and accepted is clearly mandatory. For such ascertainment, it is our view that apart from an enquiry from the accused himself, it is necessary for the court to enquire why his counsel is absent where one is still on record and has not been discharged. Where the records show that the accused is represented, the court should be put on guard whenever the accused changes his plea from not guilty to one of guilty in the absence of his counsel particularly in a case where the offence with which he is charged and to which he has pleaded guilty would be likely to attract a term of imprisonment. In the present case we think it is obvious that the President sitting as a Magistrate had overlooked two important factors before recording and accepting the plea of guilty by the respondent. First either the President had overlooked the fact that the respondent was represented, or having recognized that the respondent was represented he failed to direct his mind and to enquire why the counsel was absent. Had he done so and checked the record of proceedings, he would have discovered that the date of hearing had been brought forward to July 4 without counsel's knowledge. Secondly, on the day the respondent pleaded guilty he had been wrongly remanded for five months in spite of having been granted bail and having executed a bail bond, and as such he could not have had the advantage of any legal advice from his counsel when he changed his plea from not guilty on August 17, 1978 to one of guilty on July 4, 1979. In these circumstances we think it could not have been possible for any court to be satisfied that the respondent had really understood the nature and consequences of his plea of guilty and that he

intended to admit the offences alleged against him without qualification. Indeed, the learned DPP Encik Mohd. Shafie had conceded before the learned Judge that in the circumstances of this case an injustice had been done to the respondent. We entirely agree with the learned Deputy Public Prosecutor's concession and we think there is in fact a miscarriage of justice in this particular case. Be that as it may, we are of the view that a plea of guilty by the accused under sub-section 173(b), CPC in the absence of his counsel is not unlawful. The plea should be recorded but not accepted. Thus, whilst the plea itself is perfectly lawful, the acceptance of such a plea in the absence of counsel is bad in law as without counsel's advice the accused could not be said to have understood the nature and consequences of his plea or to have intended to admit without qualification the offences alleged against him. Our answer to the question posed by the Public Prosecutor is therefore in the positive but subject to an important qualification that such plea of guilty should only be recorded but not accepted unless the court is satisfied that the absence of Defence Counsel has been properly accounted for.

Answered accordingly.

MALAYSIAN BAR v. MUTANG TAGAL

[F.C. (Abdul Hamid C.J. (Malaya), Mohamed Azmi & Syed Agil Barakbah F.JJ.) October 16 & December 12, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 195 of 1984]

Legal Profession – Admission of advocate and solicitor – Whether period of pupillage in Sarawak valid for purpose of complying with Legal Profession Act – Whether advocate and solicitor for the purposes of section 3 of the Legal Profession Act – Legal Profession Act, 1976, ss. 3, 13(i) & 16(3).

This was an appeal from the decision of the High Court in allowing the petition of the respondent for admission and enrolment as an advocate and solicitor of the High Court, Malaya – see [1984] 2 M.L.J. 239. The main issue that arose for determination was whether the period of pupillage of the respondent in Sarawak was valid for the purpose of complying with the requirements of section 13(1) of the Legal Profession Act, 1976, having regard to the definition of "advocate and solicitor" in section 3 of the Act. The respondent had served his pupillage in the office of Mr. Peter Chin Fah Kui, an advocate of Sarawak. Mr. Peter Chin Fah Kui had not been enrolled as an advocate and solicitor under the Legal Profession Act, 1976 or the repealed Advocates and Solicitors Ordinanace, 1947. Section 3 of the Legal Profession Act, 1976 provides –

"In this Act unless the context otherwise requires 'advocate and solicitor' and 'solicitor' where the context requires means an advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act".

Held: (1) the words "any written law prior to the coming into operation of the Act" must mean, having regard to the whole of the provisions of the Act, any previous written law that was in force prior to the operation of the Act in West Malaysia, Sabah and Sarawak. The words in section 3 must by necessity refer to any written law in Sarawak, Sabah or West Malaysia repealed by section 152 as and when the Act became applicable to the three parts of Malaysia. The only written law that has been repealed is the Advocates and Solicitors Ordinance, 1947;

(2) in this case Mr. Peter Chin had never been enrolled as an advocate and solicitor either under the Legal Profession Act, 1966 or the repealed Advocates and Solicitors Ordinance and therefore was not an "advocate and solicitor" within the meaning of section 3 of the Legal Profession Act;

(3) the period of pupillage in Sarawak was therefore not valid for the purpose of complying with section 13(1) of the Legal Profession Act, 1976.

Case referred to:

(1) *Samantha Murthi* v. *Attorney-General* [1982] 2 M.L.J. 126.

FEDERAL COURT.

P. Cumaraswamy for the appellant.
Lee Min Choon for the respondent.
P. M. Mahalingam (Senior Federal Counsel), for the Attorney-General.

Cur. Adv. Vult.

Mohamed Azmi F.J. (delivering the Judgement of the Court): This was an appeal by the Malaysian Bar against the decision of the High Court at Kuala Lumpur in allowing the petition of Encik Mutang Tagal for admission and enrolment as an advocate and solicitor of the High Court Malaya. The main issue that arose for determination was whether his period of pupillage in the State of Sarawak was valid for the purpose of complying with the requirement of section 13(1) Legal Profession Act, 1976 having regard to the definition of "advocate and solicitor" in section 3 of the said Act. We had allowed the appeal and made no order as to costs. We now give our reasons.